No. 3923

United States Circuit Court of Appeals

For the Ninth Circuit

CLEM ROGERS
Appellant

vs.

BRIX BROS. LOGGING COMPANY, a corporation
Appellee

Upon Appeal from the United States District Court for the District of Oregon

Brief of Appellee

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LIST OF CASES CITED

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STATEMENT OF THE CASE.

This is a suit by Brix Bros. Logging Company, hereinafter called Brix Bros., brought against Rogers to compel him to disclose and account for money or property in his hands necessary to pay a judgment secured by Brix Bros. against the Oregon Pacific Mill and Lumber Company, hereinafter called the Oregon Pacific. The Oregon Pacific was

a creature of the war. One Corbaley had an option to purchase a mill and timber in Clatsop County, Oregon, and a tentative plan to secure a government contract to manufacture airplane spruce. The Oregon Pacific (a Nevada corporation), was formed to handle the matter.

Rogers seems to have been a controlling factor in the Oregon Pacific from the beginning, (Record, p. 48), until the end, when, although its general manager, secretary, treasurer, director and the majority stockholder, he took over for himself or otherwise disposed of all of its assets and after that he operated the mill as a sole trader under the name Clatsop County Lumber Company. Almost at the beginning (January 8, 1918) Rogers made himself the body and the Oregon Pacific the shell by having its sawmill at Astoria, timber lands and government contracts conveyed to him and at the same time he was made general manager, treasurer and in substance the majority stockholder, (Record, p. 116). This agreement was a secret one; the papers were merely placed in escrow, (Record, p. 124).

Rogers operated the business as a sole trader from October 1, 1918, and at once gave up the old government contract (Spruce Production Division—4, abbreviated S. P. D—4) and took a new one (S. P. D.—261) but the new contract was only for the unexpired term of the old one and the footage was without doubt the amount undelivered under

the old. The armistice came on November 11, 1918, whereupon the government gave notice that no more spruce deliveries would be accepted. Rogers in his own right and as assignee of the Oregon Pacific filed a claim with the government for reimbursement for damages and was allowed $60,000 which he collected and receipted for.

Thus far the story of the case has covered the part played by Rogers with the Oregon Pacific; we now come to Brix Bros. In August, 1918, Brix Bros. sold and delivered to the mill operated in the name of Oregon Pacific, spruce logs of the value of $15,136.39. These logs were sawed into lumber and sold and Rogers collected the proceeds. Brix Bros. not being able to collect its money secured a judgment against the Oregon Pacific in the Circuit Court of Oregon for Clatsop County on July 17, 1919, and on execution was able to reach only $1,133.46, leaving due on such judgment the sum of $14,754.01 with interest at six per cent from August 29, 1919. A further execution disclosing no property of the Oregon Pacific, this suit was brought, also in the Circuit Court of Oregon for Clatsop County, to compel Rogers to disclose and account for money or property received by him from or for the Oregon Pacific and requiring him to pay the judgment of Brix Bros. had against the Oregon Pacific in the amount of $14,754.01 and for a decree against him for that amount. The case was re-

moved by Rogers to the United States District Court for Oregon.

Rogers' amended answer and his position in the District Court as well as here, may be summarized as claiming:

(a) Rogers cannot be compelled by a court of equity to account for property of the Oregon Pacific, it being asserted that he had the right to prefer and pay himself or others and therefore holds no such property at this time;

(b) No recovery can be had because Brix Bros. did not make a demand on the Oregon Pacific to sue Rogers;

(c) The suit must fail because Brix Bros. does not sue for all creditors but for itself, and

(d) Oregon Pacific is an indispensable party and therefore the court was without jurisdiction.

The case was tried before District Judge Bean resulting in a decree for Brix Bros. from which Rogers appeals.

ARGUMENT.

I.

At the threshold of the case it must be recalled that Brix Bros. is a judgment creditor of the Oregon Pacific in the amount of $14,754.01 and neither the account for spruce logs sold nor the judgment based thereon are disputed. Nor can it be disputed, as will be shown presently, that the spruce logs for which this judgment was secured were sold at a time—August 1918—when Rogers was, secretly, in absolute control of the Oregon Pacific with power, as now claimed, to turn over its assets to himself, but as its general manager and in other official capacities holding it out as a real corporation purchasing logs from Brix Bros., selling the product and himself collecting the proceeds.

It is not denied by Rogers that the Oregon Pacific had a mill worth as of September 1, 1918, $246,312.15 (Record, p. 132), logs and lumber worth $59,834.95 (Record, p. 133), book accounts, cash and other assets $91,000.00 (Record, p. 134), and that he collected from the government at a later date $60,000.00 which was at least connected with the operation of the above property. These items total $457,147.10, but Rogers, "the angel" of the Oregon Pacific (suggested in appellant's brief, p. 3), saw to it that the judgment of Brix Bros. was not paid, the only relief now offered being the suggestion that "plaintiff with its judgment is merely unfortunate" (appellant's brief, p. 9).

We proceed therefore to analyze the facts showing why the judgment of Brix Bros. was not paid and why a court of equity should award relief.

II.

Rogers seems to have been a moving spirit in the Oregon Pacific from the beginning for we have his statement "the claimant (Rogers) and his predecessors in interest caused to be organized the Oregon Pacific Mill and Lumber Company" (Record, p. 48). About December 20, 1917, Rogers agreed to put up certain indemnity with a surety company in order that the Oregon Pacific might furnish a bond required in securing government contract S. P. D.—4, (Record, p. 116). This contract, dated December 22, 1917, was secured from the government and called for ten million feet of spruce lumber at $105 per thousand (Record, p. 88).

But Rogers would not arrange the indemnity without control of the Oregon Pacific and he got it through the agreement of January 8, 1918, (Record, p. 116). By this agreement made with him by the Oregon Pacific, its directors and sole stockholders,

(a) All its property was granted and assigned to him including contracts with the United States.

(b) He was made general manager and treasurer "with full power and authority to exercise without any further resolution or authorization * * * each and all powers and rights of said corporation * * * to the same extent that the said powers and rights could be exercised by said corporation, its directors, members, or stock-

holders or officers or attorneys" (Record, p. 118).

(c) He was to be paid $250 per month.

(d) He was to be repaid for any advances he might make at the rate of $20,000 per month.

(e) He was to be paid 20% of all net profits of the Oregon Pacific.

(f) He was to be pledgee of 1,250 shares of stock which was much in excess of a majority.

Other provisions in this agreement merely increased the opportunity of Rogers to operate this corporation for his own personal benefit.

In February, 1918, Rogers concluded that in lieu of the government financing the operation which had required the surety bond and the indemnity from Rogers, he would do the financing and the government was paid back, Rogers furnishing the money. It is quite evident that Rogers kept strengthening his grip over the Oregon Pacific, with the consent of the stockholders, with the plan of securing such profits as might be forthcoming and at the same time secretly protecting himself against claims of creditors, for about this time the deed and bill of sale from the original vendors were taken, not in the name of Oregon Pacific, but in the name of Rogers, (Record, p. 124). These were not recorded but held in escrow and the Oregon Pacific was apparently held out as the operator of the property. On April 7, 1918, Rogers knew the opera-

tions were unsatisfactory and he required the books to be kept in San Francisco, (Record, p. 125). In July, 1918, Rogers came to Portland and as a result of this trip he required that 51% of the stock of the Oregon Pacific be turned over to him, and waived his right to 20% of the profits, (Record, p. 126).

It is thus apparent that by August, 1918, Rogers was the master and in fact the Oregon Pacific. Its board of directors and stockholders had made him its general manager, treasurer, director, majority stockholder, custodian of its books, secret escrow grantee and assignee of its property and on top of all this they had literally voted to give him "all powers and rights of said corporation * * * to the same extent that the said powers and rights could be exercised by said corporation, its directors, members or stockholders or officers or attorneys." If anything remained of the Oregon Pacific but its name or shell it is difficult to know what it was. All this was known to Rogers in August, 1918, and more; he knew it was only a matter of days when he would gather in its property under a claim of forfeiture and it could not pay all its debts.

Under these circumstances Brix Bros. in August, 1918, sold to the Oregon Pacific the logs for which its judgment was later secured. The logs were cut, sold and Rogers collected the proceeds, (Record, p. 6).

On September 1, 1918, Rogers claims to have

taken possession of the property, (Record, p. 127), but the operation was continued as before—by the shell the Oregon Pacific. On September 24, 1918, the board of directors of the Oregon Pacific, consisting now of Rogers, Dohrmann and Rider, the other two directors having resigned, met and solemnly voted approval of Rogers' action in taking possession of the property (Record, p. 127). At this meeting Rogers seems to have annexed the office of secretary and it was Rogers who offered the motion that his taking over the property for his own benefit be approved. It also appears that the deed and bill of sale to Rogers had now been recorded.

On October 8, 1918, a stockholders' meeting of the Oregon Pacific was held, Rogers owning and voting 924 shares out of 1,202 present, (Record, p. 131). At this meeting it was resolved to cancel government contract S. P. D.—4 as of September 30, 1918, but Rogers immediately secured a continuation contract, S. P. D.—261, dated October 8, 1918, (Record, p. 107). This contract covered the unexpired term of S. P. D.—4 with the same monthly deliveries, and the total quantity, conceded to be the balance due, under the first contract, (appellant's brief, p. 5). Contract S. P. D.—261, although signed and approved, was never delivered to Rogers, (Record, p. 100). From October 1, 1918, Rogers operated the property as a sole trader under the name Clatsop County Lumber Company. On

November 11, 1918, the government gave notice that further deliveries of spruce lumber would not be accepted whereupon Rogers prepared and submitted a claim for reimbursement. Here although in supreme control of the Oregon Pacific and its property he claims to have collected nothing on its account and if he did that he was entitled to keep it, Brix Bros. with its judgment, to the contrary notwithstanding.

First of all did he collect anything on account of operations under S. P. D.—4? His claim was based upon the original contract, (Record, p. 47). It is headed "Presented herewith is the claim of Clem W. Rogers in his own right and as assignee of the rights of the Oregon Pacific Mill and Lumber Company for reimbursement for damages suffered by reason of the breach and cancellation by the United States of its contract with claimant." He stated that "the claimant and his predecessors in interest caused to be organized" the Oregon Pacific "and the corporation secured in compliance with the order referred to a certain contract." He further declared "for the sole and only purpose of manufacturing and delivering said airplane spruce called for by said contract * * * the claimant or his predecessors in interest purchased a large amount of timber, a mill and mill site." Thus far the language clearly refers to S. P. D.—4. Other references are to the same effect, of which we quote the following:

> "Inasmuch as the claimant and his predecessors in interest entered into this contract for the sole purpose of furnishing airplane spruce to the Government it is willing that said contract should be cancelled. The claimant does not ask the United States Government for any profit that he is able to show would have been made under the original contract, nor does he ask for any loss that he or his predecessors in interest may have suffered by reason of the change in condition ordered by the Government. The claimant does ask at this time to be made whole for the actual investment made for the sole and only purpose of furnishing to the Government spruce which it urgently needed, and to supply it was the sole reason of the investment made." (Record, p. 49.)

There could seem to be no mistaking of these references and that S. P. D.—261 is not mentioned which was the view of the District Court. But appellant's brief (page 28) asserts this is error because the claim is presented in part "in his own right" and it is said "its contract" must mean his own contract or S. P. D.—261. The fallacy of this is in failing to consider the language of the claim in its entirety. Furthermore, Rogers by this time had come to look upon all assets and claims of the Oregon Pacific as his and again if we are to follow the example in appellant's brief (page 28) and split hairs on words "its contract" would not refer to Rogers' contract but more properly to the Oregon Pacific contract.

But the supporting papers accompanying Rogers' claim further show it was based upon operations under S. P. D—4. Plaintiff's exhibit No. 3, (Record, p. 50), signed by Rogers is a detail statement which discusses S. P. D.—4, but does not mention S. P. D.—261. Furthermore this statement repeatedly refers to "claimants" indicating that the Oregon Pacific operation is included. Finally the certified accountant's reports, (Record, pp. 64-88), which were filed with the claim, seem to demonstrate completely that operations or investments under S. P. D.—4, were the large part if not all of the claim. These reports cover operations and investment of the Oregon Pacific from the beginning.

More than this, there was included by Rogers in the claim filed by him with the government, wherein he asks for reimbursement on investments, the very unpaid account of Brix Bros. for logs sold to Oregon Pacific in August, 1918, (Record, pp. 6, 82). The irony of the situation is apparent when it is remembered that Rogers collected from the government $60,000 on a claim supported by the Brix Bros. account which made up more than half of the bills payable shown on the account supporting the claim, and Brix Bros. is still unpaid.

The award made by the government of $60,000, (Record, p. 99) shows a consideration of operations under both contracts, but primarily under the first.

In the language of the District Judge, "its findings recite the history of the transaction from the making of the contract with the corporation in December, 1917, to the refusal of the government to accept further deliveries and based thereon recommended the allowance." (Record, p. 90.) The Contract Board which made the settlement concluded its findings by recommending that "Clement W. Rogers be reimbursed in the sum of $60,000 in full and final settlement of any and all claims growing out of the cancellation of contracts S. P. D—4 and S. P. D.—261, it being understood and agreed that this settlement covers all claims of Clement W. Rogers, the Oregon Pacific Mill and Lumber Company and the Clatsop County Timber Company," (Record, p. 103). Rogers filed a written acceptance, in which he agreed to take $60,000 in full satisfaction "of any and all claims and demands we have or may have * * * in any way growing out of our contracts S. P. D.—4 and S. P. D.—261," (Record, p. 104). Furthermore, Rogers executed a release in which he acknowledged satisfaction of all claims "growing out of or based upon the above mentioned contract S. P. D.—261 and S. P. D.—4," (Record, p. 105).

It seems clear then from a reading of the claim and supporting papers filed by Rogers and the findings and release covering the settlement, that operations under contract S. P. D.—4 were included and settled, and on this point the District Court after

hearing the evidence was convinced. It is difficult, therefore, to understand the insistence found in appellant's brief that the settlement did not include these operations. The fallacy seems to be in overlooking the fact that it was reimbursement for investment which was set up in the claim filed by Rogers and was the basis upon which the government settled. The investment had been made long before Rogers secured contract S. P. D.—261; it was made in the name, at least, of the Oregon Pacific under contract S. P. D.—4. But counsel argues that S. P. D.—4 had been cancelled by the Oregon Pacific and therefore no part of the $60,000 covered operations under that contract. It will be remembered that Rogers was the majority stockholder whose action authorized the cancellation and Rogers immediately secured a new contract which was a mere continuation of the old. Furthermore, whether S. P. D.—4 was cancelled or not, the investment upon which reimbursement was sought had already been made and this was the basis of the claim and settlement. Again it is argued in appellant's brief that because the Contract Board figured on amortizing the investment for the balance of the term of eighteen months, all of the allowance should belong to Rogers because he would have operated under contract S. P. D—261 for the balance of the term. Again, the fact that amortization was based upon the investment seems to be wholly overlooked.

The plain fact is that this award of $60,000 was as much the property of the Oregon Pacific as the sawmill, logs, lumber, or accounts and no fine-spun method of figuring can prevent its right application with other property of the Oregon Pacific to the payment of a just and lawful judgment secured by Brix Bros. We have pointed out with considerable detail the chronological history of Rogers in this entire transaction. It establishes one of two legal results, either the Oregon Pacific must be disregarded and Rogers looked upon as the real force operating the business in August, 1918, when the Brix Bros.' account was earned, or Rogers so manipulated the business and assets of the Oregon Pacific as that in equity and good conscience, he will not be permitted to prefer himself and must account for enough property, which confessedly came into his hands from the Oregon Pacific, to pay the Brix Bros.' judgment.

III.

It has been pointed out that in August, 1918, Rogers was virtually the Oregon Pacific. The entire management, control and operation of the business was in his hands and looking at the substance rather than the form, it was Rogers' business that was being carried on, his money was being invested and he was anticipating the profits. Under these circumstances the case would seem to call for an application of the rule wherein courts

look through corporate forms for the purpose of justice to ascertain the rights and the true relations of the parties. If it was Rogers' business that was being done when Brix Bros. sold the spruce logs, then Rogers should pay the judgment. Illustrations may be given of the rule above mentioned and they are to be found covering a variety of situations. Some of the cases are:

Chicago, M. & St. P. Ry. Co. vs. Minneapolis etc. Association, 247 U. S. 590, 38 S. C. R. 553.

Cleveland-Cliffs Iron Co. vs. Arctic Iron Co., 261 Fed. 15.

United States vs. Beebe, 127 U. S. 338, at 344.

J. J. McGaskill Co. vs. United States, 216 U. S. 504, 30 S. C. 386, 391.

In the first case cited the court after pointing out the existing relations of corporations, said:

> "With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public."

In the *McGaskill Company* case last cited, the court said:

> "Undoubtedly a corporation is, in law, a

> person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, Sections 663, 664 and 727."

With this view of the case it is clear that a court of equity could require Rogers to pay the Brix Bros. judgment because it was in fact Rogers' debt.

In re Eilers Music House, (C. C. A. 9th Circuit), 270 Fed. 915, this court in a proceeding to uncover and disclose assets, although not a judgment creditor's suit, adopted the following language of the referee:

> "In such cases equity looks through and beyond legal fictions and deals with the parties and the properties irrespective of corporate forms, upon the theory that now to contemplate Oregon Eilers as an independent organization which its promoters may take to themselves from the general assets, is a legal fraud

> upon the creditors. This principle has been many times applied and is abundantly established by the following cases:" (citing cases).

In any event this case is essentially in the nature of a judgment creditor's suit. It falls within the principles covered by Mr. Pomeroy in his excellent discussion in Vol. V, Pomeroy's Equity Jurisprudence, Fourth Edition, Sections 871 to 895. As said in *Pierce et al. vs. U. S.,* 255 U. S. 398, 41 S. C. R. 365 at 366:

> "A judgment creditor's bill is in essence an equitable execution comparable to proceedings supplementary to execution. See *Ex Parte Boyd,* 105 U. S. 647, 26 L. Ed. 1200. The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disable itself from responding by distributing its property among its stockholders and leaving remediless those having valid claims. In such a case the claims after being reduced to judgments may be satisfied out of the assets in the hands of the stockholders."

Rogers, with all the control over the Oregon Pacific that could be exercised, has taken over and paid to himself or otherwise disposed of, assets amounting to $457,147.10. He claims to have used these assets to pay himself or other creditors, excluding, however, the Brix Bros.' judgment. The arrangement by which he undertakes to justify such action was a secret one known to himself but not to Brix Bros. at the time the spruce logs were sold. The credit which the Oregon Pacific was able to

secure from Brix Bros. was made possible by Rogers' concealment of the situation. It may be Rogers as a creditor of the Oregon Pacific owed no duty to Brix Bros., but as a general manager, director, majority stockholder and in other official capacities, he should not be permitted to encourage the sale of spruce logs by Brix Bros. the benefits of which he was to secure through his secret advantage as a creditor.

The position of Rogers in holding out the Oregon Pacific and then in taking over all of its assets, including the settlement of $60,000 secured partly through a showing of the very claim which has not been paid, was under the facts shown a fraud on the creditor. It is the opposite of fair dealing and it is submitted, is such a situation as courts of equity are empowered to inquire into and give relief.

The reported cases cover a variety of facts in creditor's suits and no good can come from a discussion of such facts. Illustrative cases, however, in this Circuit are to be found in

Feidler vs. Bartleson, (C. C. A. 9th Circuit), 161 Fed. 30.

Murray vs. Sioux Alaska Mining Co., (C. C. A. 9th Circuit), 239 Fed. 818.

In *Clere Clothing Company vs. Union Trust and Savings Bank,* (C. C. A. 9th Circuit), 224 Fed. 363, in a bankruptcy proceeding the Clere Clothing

Company occupied much the same position as Rogers here. This court said:

> "The scheme of the Clothing Company is easily discerned. It proposed to play safe, regardless of the ultimate condition of the Prager-Schlesinger Company. If the latter company should be successful there can be no doubt that the profits would have gone to the Clere Clothing Company or to the National Bank of Commerce in payment of the indebtedness of the Clothing Company. If the Prager-Schlesinger Company should fail, as it did in fact fail, the Clothing Company proposed to be in position to prevent and insist upon the payment of its alleged claims. Such tactics are not to be commended. A corporation may not for a period of over a year so entwine its affairs and business transactions with a second company as to virtually create the relation of principal and agent, and then upon the insolvency of the second company, insist upon the payment of alleged debts incurred in the very transactions by which the relationship was created."

The situation of Rogers is again illustrated by the language of the court in *Baltimore and Ohio Telegraph Company vs. Interstate Telegraph Company,* (C. C. A. 4th Circuit), 54 Fed. 50. Here the Baltimore and Ohio Railroad Company had organized the Baltimore and Ohio Telegraph Company and dominated its affairs. It claimed to be a stockholder and creditor of the Baltimore and Ohio Telegraph Company, and compelled the latter company to turn over or sell all of its assets and undertook to pay itself. In the meantime the Baltimore and

Ohio Telegraph Company had incurred obligations to the Interstate Telegraph Company which had resulted in a judgment against the former. The court held that when the Baltimore and Ohio Railroad Company took possession of, controlled and appropriated the property, it was bound to pay the debt, saying:

> "This result follows, whether it acted as sole beneficial owner of all its stock, or as creditor who had made large advances, or as principal who had placed large and valuable assets in the hands of its agent, as ostensible owner, and thus secured its credit, or as vendor who had sold on credit without taking mortgage security, or as lessor who had entered upon the possession of its lessee."

IV.

Objection is made by appellant that no recovery can be had because Brix Bros. did not make a demand on the Oregon Pacific to sue Rogers. This objection confuses suits by or against stockholders as such with judgment creditors' suits. Here Brix Bros. had already sued the Oregon Pacific in the state court for Clatsop County and had obtained its judgment. It was unable to satisfy the judgment through execution, and then brought this suit in equity in the same state court against Rogers. It is not seeking to enforce a right of the corporation against Rogers, but it sues in its own right. The corporation was apparently satisfied with having turned over all of its property and assets to Rogers

and virtually disenfranchising itself; indeed, Rogers had become the controlling factor in the corporation and so far as the record shows, is still in that capacity. It is difficult to understand therefore, what good could have been done by demanding of the corporation dominated by Rogers, that it sue Rogers. Equity does not require vain things and this seems to be an excellent application of that rule.

Furthermore, a judgment creditor's suit is, to quote again the language of the Supreme Court in the *Pierce* case, *supra,* "an equitable execution comparable to proceedings supplementary to execution." An early case (*Gould vs. Torrance,* 19 How. Prac. 560), defines a judgment creditor's bill as being in the nature of an additional or equitable execution and not in any sense a new suit. It is submitted, therefore, that this objection must fail. The cases cited in appellant's brief on this point seem to be stockholders' suits where the rights asserted were strictly on behalf of the corporations. They do not involve judgment creditors' suits but in the main involve proceedings by stockholders to appoint receivers and wind up the corporations. Some of them discuss the right of a simple contract creditor which is entirely different from a case of "equitable execution comparable to proceedings supplementary to execution." (*Pierce* case, *supra.*)

V.

But it is urged by appellant that this suit must fail because Brix Bros. does not sue for all creditors. In the first place, it is not clear that there are other creditors, or if so, who they are, except it is claimed that Rogers and Dohrmann are creditors. As to Dohrmann, it is evident from the record that he was a stockholder and apparently acquiesced in the secret arrangements carried on by Rogers and in the transfer of all of the assets of the Oregon Pacific to Rogers. He was apparently content to wash his hands of the entire matter and since he was willing that all of the property, assets, and rights of the Oregon Pacific be turned over to Rogers it is not extraordinary that he has refrained from calling Rogers to account for any money, as suggested in appellant's brief, page 23. Dohrmann as a stockholder and at the beginning partly responsible for the venture, has evidently dismissed the matter.

It is said in appellant's brief, page 24, "there are still numerous other creditors of this company who have never been paid." This is putting the matter rather strong. The only warrant for such statement is Rogers' claim "there are apparently still other claims as yet unpaid," (Record, p. 134). The amount of these claims or their owners, are not shown. So far as appears, therefore, Brix Bros., with its judgment is the only substantial

claim outstanding which was incurred in good faith and is entitled to be paid.

The objection that it does not sue for all creditors seems to be effectively disposed of by this court in *Murray vs. Sioux Alaska Mining Company,* 239 Fed. 818, where it was said:

> "The point that the action is not brought on behalf of appellant and other creditors is not fatal to the bill. *Tatum vs. Rosenthal,* 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97. At most there would be a defect of parties plaintiff, which is a ground of special demurrer, or the point might perhaps be presented by answer. *Morrison vs. Blue Star Navigation Co.,* 26 Wash. 541, 67 Pac. 244. In *Birely's Executors vs. Staley,* 5 Gill & J. (Md.) 432, 25 Am. Dec. 303, in a suit in equity to vacate conveyances, two creditors joined in the bill of complaint, and it was urged that all or one only should have been made party complainant. The court held that that was a mere formal objection, and if well taken might have been removed by amending the bill. The court said:
>
> " 'Rules of pleading in equity are not governed by the same technicality as to matters of form that controls proceedings at law. Courts of equity look to substance, not form. The distinction, then (if it exist at all, which we cannot admit), is a mere matter of form; nothing in reason or substance can be urged in its support. If one of many creditors proceed, and be successful, the fund is retained in chancery until all the creditors are notified to come in and assert their claims. The same practice prevails on like proceeding by two.' "

It is to be remembered that no objection on this

point was raised by answer or at the trial and if objection had been made we submit it is not fatal to the case.

VI.

Finally, it is claimed by appellant that the Oregon Pacific is an indispensable party to this suit and therefore the court was without jurisdiction to make its decree.

The cases cited in appellant's brief from New York and New Jersey are not based on facts, at all, comparable with the facts here. Furthermore, the rule as to indispensable parties has been much relaxed in the Federal Courts as against the rule announced in some of the early State Court decisions. This relaxation was in order to prevent Federal Courts from losing jurisdiction due to requirements as to diversity and residence of parties. (Simpson, Federal Equity Suit, Third Edition, Chapter XL.)

Mr. Justice Sanborn in *Rogers vs. Penobscot Mining Company,* (C. C. A. 8th Circuit), 154 Fed. 606, defines such a party as:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

In this case how can it be said that the Oregon Pacific would be radically or at all affected by the decree? Where is there any lack of equity or good conscience in the decree against Rogers without the presence of the Oregon Pacific? The claim had already been litigated with that corporation and the validity of the claim has been settled. Furthermore, all of the property and assets have been turned over to Rogers, and the corporation itself has no interests to be affected. Moreover, Rogers was and is the master of the corporation, with its consent, and therefore represents it.

The case is well illustrated by *Bank of Commerce and Trusts of Richmond vs. McArthur* (C. C. A. 5th Circuit), 256 Fed. 84, where the court said:

> "In behalf of the appellees it is contended that the dismissal of the bill is sustainable on the ground stated in the decree, namely:
>
> " 'That the defendants Adam McArthur, J. Sprunt Newton, and W. M. Walker are necessary parties to this cause, and that they are not citizens or residents of the State of Florida, and not subject to the process of this court, and cannot be subjected to the jurisdiction thereof by personal or constructive service.'
>
> "The property sought to be subjected to the satisfaction of the appellant's demands is the above referred to Florida property which formerly belonged to Adam McArthur, and was transferred by him as above stated. Under the averments of the bill, that former owner of the property in question no longer has any interest in it. He has no such interest in the subject of the suit as requires that he be

made a party to it. He would not be prejudiced or affected by a decree subjecting the property in question to the satisfaction of the appellant's demands. The attacked transfers and conveyances are binding as between him and his transferees or grantees, the resident defendants proceeded against. The averments of the bill show that those transfers are not binding upon the appellant, the transferror's creditor. Relief sought could be granted without affecting either of the three non-residents who were named as defendants. As to them, the suit can be abated, and it may then be prosecuted against the resident defendants. No one of the three named non-residents is an indispensable party to the suit."

The point that the Oregon Pacific is an indispensable party in this, a judgment creditor's suit, seems to be settled by the language of the Supreme Court in *Pierce vs. United States,* 255 U. S. 398, 41 S. C. R. 365 at 368. In that case the United States had secured a judgment against Waters-Pierce Oil Company. It brought a judgment creditor's suit against Waters-Pierce Oil Company, trustees, and certain stockholders. The property of the corporation had been sold to another and the proceeds paid to the trustees and in turn distributed among the stockholders. The District Court dismissed the bill as to the Waters-Pierce Oil Company and the trustees, but granted relief against the stcokholders. The court said:

"The contention is faintly made that the decree should be reversed because the District Court dismissed the bill as against the Waters-

> Pierce Oil Company, a necessary party, citing *Swan Land & Cattle Co. vs. Frank,* 148 U. S. 603, 610, 13 Sup. Ct. 691, 37 L. Ed. 577. The argument ignores the fact that this judgment, being in favor of the United States, is, under Section 986 of the Revised Statutes, effective and may be made the basis of an execution running in a state and district other than that in which the judgment was rendered. It was doubtless for this reason that the District Judge concluded that it was unnecessary, if not improper, to enter in this suit judgment against Waters-Pierce Oil Company. The objection is purely technical."

It will be seen from this language that the court found that since the judgment under the Federal statute was effective in the district in which the creditor's suit had been brought, therefore, any further judgment or decree against the debtor corporation was entirely unnecessary and of no purpose. It will be remembered that the Brix Bros. judgment was secured in the same court in which the creditor's suit was instituted. The Oregon Pacific had turned over its property so far as it was concerned to Rogers, and it was against Rogers that the suit was brought—by Brix Bros. in its own right—to compel him to disclose property and respond for this judgment. It is submitted that Rogers' anxiety over the absence of the non-resident Oregon Pacific (a Nevada corporation), or that it will be injured by the decree against him because it is not a party, can hardly be taken seriously.

CONCLUSION.

It is submitted that the facts of this case conclusively show Rogers to have been the real entity operating the Oregon Pacific in August, 1918, through a secret arrangement known to himself and the Oregon Pacific. Credit was obtained under these circumstances and he cannot deny responsibility for obtaining such credit because he was in charge. When it suited his purpose, he announced to the world that he had taken actual possession of all the property and he has undertaken to use it, in the main, by paying himself.

Under the circumstances of the case, the langauge of Mr. Justice De Haven in *Blanc vs. Paymaster Mining Company,* 95 Calif. 524, in discussing an early Federal case, (*Hibernia Insurance Company vs. St. Louis etc. Company,* 13 Fed. 516), is quite appropriate:

> "The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones,—was, in short, the old corporation,—and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be so? The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired, and possibly to the full extent,—that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable

> pretenses are to be disregarded. Shiftings of corporate names cannot defeat positive rights, any more than the change of the name of a natural person can absolve him from his personal obligations."

The case at bar is a judgment creditor's suit with adequate power in a court of equity to reach assets. These assets existed and they have been found. It is submitted that the facts and the law support the decree and it should be affirmed.

Respectfully submitted,

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